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Quasi-Contracts—Relationships Raising Presumption of Gratuity

THE FORDHAM LAW REVIEW joins in respectful tribute to our late Regent, Reverend John X. Pyne, S.J. His inspiration, interest and enthusiasm were always at the service of the REVIEW. The memory of his sterling and independent spirit will long remain with us.

COMMENTS

QUASI-CONTRACTS—RELATIONSHIPS RAISING PRESUMPTION OF GRATUITY.—Fusing in varying degrees the elements of contract,[1] tort,[2] and equity,[3] quasi-contracts may properly be termed a legal hybrid. Since the only forms of action at early common law were those in tort, debt, and contract, if the wrong sustained by a plaintiff did not come within such categories and was not sufficient to justify a bill in equity, he was left without a remedy.[4] To correct this inequitable situation the remedy of implied in law contract came into being, having its foundation in natural justice and arising for the purpose

1. Like contracts, quasi-contracts are enforced by means of the remedy of *assumpsit*. Again, quasi-contracts and contracts are based upon particular dealings between involved parties giving rise to a positive duty; in both instances the parties defendant are required to act rather than forebear. Ames, *History of Assumpsit* (1888) 2 HARV. L. REV. 53, 63; WOODWARD, QUASI-CONTRACTS (1913) 6. The notable difference, of course, between quasi-contracts and contracts is that a quasi-contract is imposed by law whereas a contract is based upon a consensual relation.

"In truth, it [quasi-contract] is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which *ex aequo et bono* belongs to another." Miller v. Schloss, 218 N. Y. 400, 407, 113 N. E. 337, 339 (1916).

2. A quasi-contract smacks of tort in that it is essentially non-contractual. It differs from a tort in that it gives rise to a particular duty to act as distinguished from a general duty to withhold action. Langdell, *Classification of Rights and Wrongs* (1900) 13 HARV. L. REV. 537, 542-545. The tortious defendant is usually punished because he acted (*e.g.*, negligently injured the plaintiff); whereas the defendant in a quasi-contractual action is liable because he did not act (*e.g.*, failure to return money paid by mistake). WOODWARD, QUASI-CONTRACTS (1913) 8.

3. The distinguishing characteristic of quasi-contractual relations is the essential equitable approach to the solution of the problem. Charged with principles of justice, fair play and morality, the body of quasi-contract law is permeated with the flexibility which predominates in the field of equity. The restriction of remedy to money judgments and the enforcement of such remedy in a court of law mark the differences between quasi-contractual and equitable relief.

4. Woods *et al.* v. Ayres, 39 Mich. 345 (1878); KEENER, QUASI-CONTRACTS (1893) 14. For an excellent summary of the development of quasi-contract see RESTATEMENT, RESTITUTION (1937) 3-6.

of preventing the unjust enrichment of one party at the expense of another.[5] So where a benefit was conferred by one party upon another, who was thereby unjustly enriched, the courts invented the fiction that the two had entered into a contract,[6] even though the beneficiary never expected to reimburse the plaintiff and indeed even where he deliberately intended the contrary.[7] Thus was the plaintiff brought within the expanding remedy of *indebitatus assumpsit* and the defendant made liable to him for the reasonable value of the benefits which he, the defendant, had received.[8] It is important to note that quasi-contract is distinctly a creature of the law and has an entirely separate existence from the implied in fact contract, which necessarily embodies a meeting of the minds and an actual agreement.[9] An implied in fact contract differs from an express contract not in kind, but merely in the mode of proof;[10] in an implied in law contract there is neither a promise to recom-

5. Moses v. Macferlan, 2 Burr. 1005, 97 Eng. Reprints 676 (1760); KEENER, QUASI-CONTRACTS (1893) 16; 1 WILLISTON, CONTRACTS (2d ed. 1936) § 36a. Although unjust enrichment is the general basis of the implication it is not exclusive. The law sometimes enforces a duty to restore a plaintiff to a former status, not merely to surrender a benefit which the defendant has received. 1 WILLISTON, CONTRACTS § 3; RESTATEMENT, RESTITUTION (1937) § 1 (e).

6. The necessity of conferring a benefit in such cases is brought out in Credit Alliance Corp. v. Sheridan Theatre Co., 241 N. Y. 216, 149 N. E. 837 (1925). Plaintiff was a credit company from whom the president of defendant company borrowed money, allegedly for defendant's use. The president gave the plaintiff a promissory note of defendant's signing his own name and forging the other necessary signature. In return for which he took back a check payable to defendent which he deposited in defendant's bank account. He then drew a check to his own order and used the money for his own purposes. The court refused to allow plaintiff to recover stating: "The money having been immediately withdrawn by Spiegel and converted to his own use without the corporation's knowledge of the transaction or that the funds had even been placed to its credit, it enjoyed no benefit and exercised no dominion over the same." Credit Alliance Corp. v. Sheridan Theatre Co., 241 N. Y. 216, 221, 149 N. E. 837, 838 (1925).

7. The intent to contract is lacking where a suit is brought by a doctor for emergency services rendered to an employee of a corporation. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 S. W. 461 (1909). Those cases wherein there is not only lacking an intent but a positive mental attitude to the contrary are set forth thus by Blackstone: "If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages upon the contract, which the law always implies, that every transaction is fair and honest." 3 BL. COMM. *165.

8. Moses v. Macferlan, 2 Burr. 1005, 97 Eng. Reprints 676 (1760). For such damages the plaintiff was allowed to recover on the common counts, *e.g. quantum meruit*, money paid, services rendered, and goods received. The remedy of *indebitatus assumpsit* is itself a hybrid, resulting from a combination of actions in debt with actions of *assumpsit*. WOODWARD, QUASI-CONTRACTS (1913) 3.

9. Columbus, H. V. & T. Ry. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152 (1901); Hertzog v. Hertzog, 29 Pa. 465 (1857). In the latter case the court classified quasi-contracts as "constructive" and implied in fact contracts as "implied", which would seem to be a less confusing method of distinction.

10. An implied in fact contract is established through a study of the conduct of the parties viewed in the light of surrounding circumstances. Express contracts are proved by

pense the plaintiff nor is there in any real sense an agreement between the parties.[11]

The necessary elements to the quasi-contract are, therefore, the sustaining of a benefit by the defendant,[12] and the suffering of an injustice by the plaintiff.[13] Under these requirements, it follows that where the plaintiff is merely performing a gratuitous act,[14] the law will refuse to presume that there is an implied in law contract. Where, therefore, from the very relationship existing between the parties, whether fiduciary, commercial, societal or family, it is customary to render such reciprocal or unilateral acts of kindness of courtesy, then there will be no contract implied in law.[15]

Our problem is the consideration of those relationships which will impel the law to refuse to create a contract even though the circumstances and events reveal an enrichment. The relationships wherein the presumption of reimbursement is absent—in whole or in part—are the following: I. Family Relationships; II. Commercial Relationships; and III. Societal Relationships.

I. Family Relationships

As a necessary preliminary to this, the most litigated branch of the subject, the actual meaning of the word "family" should be considered. The Roman law, under its broadest concept, designated as members of the *familia*—from which our English word "family" is derived[16]—all those who were under the dominion of the *pater-familias*,[17] or chief of the house, and included all others

showing the oral or written terms of the agreement. Columbus, H. V. & T. Ry. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152 (1901); Keener, Quasi-Contracts (1893) 5.

11. Balkan v. Buhl, 158 Minn. 271, 197 N. W. 266 (1924), 35 A. L. R. 470 (1925).

12. See note 6, *supra*.

13. Dallman v. Frank, 1 Cal. App. 541, 82 Pac. 564 (1905); James v. O'Driscoll, 2 Bay 101, 1 Am. Dec. 632 (S. C. 1798). In neither of these cases was there an intent at the time the services were rendered to submit a bill therefor. Plaintiff consequently failed to recover. But in Christianson v. McDermott's Estate, 123 Mo. App. 448, 100 S. W. 63 (1907), services which had been performed in expectation of reimbursement through the beneficiary's will, were allowed to form the basis of an action in quasi-contract, despite the fact that the compensation had not been provided in the form expected, the court holding nonetheless that plaintiff's intention to recover in some form was sufficient for purposes of this suit.

14. Silano v. Carosella, 272 Mass. 203, 172 N. E. 216 (1930); Cicotte v. St. Anne's Church, 60 Mich. 552, 27 N. W. 682 (1886). The following cases seem to stand for the proposition that where services rendered are for the mutual benefit of both parties, the one performing may not recover thereon. *In re* McCarthy Portable Elevator Co., 196 Fed. 247 (D. D. N. J. 1912), *aff'd*, 201 Fed. 923 (C. C. A. 3rd, 1913); Jones v. Clark, 28 Iowa 593 (1870); Palmer v. Haverhill, 98 Mass. 487 (1868); Rogers v. Westfall, 95 W. Va. 78, 120 S. E. 191 (1923). However, this is probably considered as evidence of an intent not to charge compensation for services.

15. Fitzgerald & Mallory Construction Co. v. Fitzgerald, 137 U. S. 98 (1890) (commercial relationship); Spadoni v. Giaconnazi, 27 Cal. App. 149, 149 Pac. 51 (1915) (friendly relationship); Winkler v. Killian, 141 N. C. 575, 54 S. E. 540 (1906) (family relationship).

16. Radin, Roman Law (1927) § 39.

17. Campbell, Compendium of Roman Law (2d ed. 1892) 16-17.

living together under the family roof.[18] Although the Canon Law does not specifically define what is meant by the "family,"[19] scholastic philosophy, concerned with morals, treats it as a social group consisting of father, mother and children.[20] The early Anglo-Saxon law of England recognized a term *familia* which described the measure of ground occupied by a man and his family,[21] which included all the inhabitants of his household and thus resembled the Roman law definition. As to the word "family" itself, while recognizing that the term was susceptible to varying and elastic interpretations, depending upon what phase of the law was concerned,[22] later English courts regarded it as comprising all those who lived under the same roof with the *pater-familias*.[23]

Turning now to the precise question herein involved, namely the meaning of "family" for the purpose of the law of quasi-contracts, it becomes apparent that the broader definition of the term "family" is that applied. How else to explain the declarations of the courts that strangers to blood,[24] or those remotely related through blood or affinity[25] may still live in the "family" relation? Even under the more liberal construction of the term, however, there is no room for the inclusion of boarders or any others occupying rooms in a house under some financial or other arrangement.[26]

Once a family relationship is established, then services rendered by one member of a family to another are deemed to have been gratuitous and the courts refuse to apply the general rule that valuable services rendered by one party for another's benefit have been so performed in contemplation of some compensation therefor.[27] And the reason for this rule is that such human

18. HUNTER, INTRODUCTION TO ROMAN LAW (New ed. 1921) 27; RADIN, ROMAN LAW (1927) § 39.

19. An examination of the following authorities failed to disclose a definition of the word "family": AUGUSTINE, COMMENTARY ON THE NEW CODE OF THE CANON LAW (4th ed. 1921); AYRINHAC, CONSTITUTION OF THE CHURCH IN THE NEW CODE OF CANON LAW (1925); CICOGNANI, CANON LAW (1934); WOYWOOD, PRACTICAL COMMENTARY ON THE CODE OF THE CANON LAW (1925).

20. 2 MERCIER, MANUAL OF MODERN SCHOLASTIC PHILOSOPHY (3rd ed. 1923) 316.

21. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 64.

22. Pigg v. Clarke, 3 Ch. D. 672 (1876).

23. "In common parlance, the family consists of those who live under the same roof with the pater-familias, those who form (if I may use the expression) his fireside". Kenyon, C. J. in King v. Inhabitants of Darlington, 4 T. R. 797, 800, 100 Eng. Reprints 1308, 1309 (K. B. 1792).

24. See note 41, *infra*.

25. See notes 47, 48, 49, *infra*.

26. Wallace v. Schaub, 81 Md. 594, 32 Atl. 324 (1895) (boarder). That the purpose for which a party comes into the plaintiff's home is the dominant consideration in determining whether he or she is to become a member of the family is borne out by Wence v. Wykoff, 52 Iowa 644, 3 N. W. 685 (1879), where plaintiff's invalid mother-in-law requested him to take her into his home specifically to care for her in her old age, having expressed a desire to reimburse him. The court held that no family relationship had ever come into being. In Gordan v. Wyness, 169 App. Div. 659, 155 N. Y. Supp. 162 (2d Dep't 1915), the court held that an agreement whereby plaintiff was to keep defendant's child until it reached full age did not constitute the child a member of plaintiff's family.

27. Mitchell v. Mitchell, 204 Ky. 745, 265 S. W. 301 (1924); Hapke v. Hapke, 93 Okla. 180, 220 Pac. 660 (1923); Riley v. Riley, 38 W. Va. 283, 18 S. E. 569 (1893).

relationship is the fountain head for the performance of spontaneous benefits based upon motives of love and affection; that people living together under such circumstances generally pool their resources and energies to work together for the common good.[28] The law then merely recognizes what natural sentiment and common experience have shown to be the case: that members of the same family do not as a rule attach a monetary value to their mutual services.

A natural query at once arises: what kind of services will be presumed to have been gratuitously rendered and what kind will be presumed to have been performed in expectation of reimbursement? If the family relationship is the dominant consideration in testing out these presumptions, then it would seem that only those services which would naturally be interchanged between members of the same family should be considered. But the courts have not probed this question very deeply. The majority of the courts content themselves with deciding from all the facts in the case before them whether the services and the circumstances under which they were rendered are such that the parties must have intended a contract.[29] Kentucky, however, has attempted to provide a judicial yardstick by setting up the test of whether or not the services are of a "personal" nature,[30] allowing recovery only for those which are not. This measuring rod has produced a strange effect. One would expect that the washing and mending of clothes would be of the type of work that members of a family would cheerfully discharge without any thought of recompense, and yet they have been held to be impersonal services and therefore no bar to recovery.[31] The difficulty inherent in an ambiguously worded test, such as that of "personal" services, should deter other courts from adopting it. Certainly the majority rule which looks at all the aspects of the case, although more flexible, is preferable. Offsetting the lack of certainty is the advantage of allowing the courts to weigh up the precise facts of each case in terms of equity and justice.[32]

A. Parent and Child

It would seem that this basic relationship of parent and child, the very foundation of the social order,[33] with its ties of blood and the love, affection

28. Hertzog v. Hertzog, 29 Pa. 465 (1857). As the court points out in this case, the position of a son in the family is certainly on a higher plane than that of a mere hired servant and a fusion of a parent-child with a master-servant relationship is rare.

29. Lowery v. Pritchett, 204 Ala. 328, 85 So. 531 (1920); Fuller v. Fuller's Estate, 21 Ind. App. 42, 51 N. E. 373 (1898); Cowan v. Musgrave, 73 Iowa 384, 35 N. W. 496 (1887); Davis v. Gallagher, 55 Hun 496, 9 N. Y. Supp. 11 (Sup. Ct. 1890).

30. Frailey v. Thompson's Adm'rs, 20 Ky. 220, 49 S. W. 13 (1904). It is difficult to comprehend exactly what is meant by the word "personal" as employed by the courts in such instances. In a subjective sense all services performed out of affection may be so classified. In an objective sense it would seem to include solely services to the person and would be exemplified by nursing services. If there is any merit in the so-called "personal" service test, it should be most liberally construed and extend to all services customarily performed within the domestic circle.

31. Dance's Adm'r v. Magruder, 26 Ky. 220, 80 S. W. 1120 (1904).

32. Sawyer v. Hebard's Estate, 58 Vt. 375, 3 Atl. 529 (1886).

33. The parent-child relation is truly the keystone of our society. The ties existing be-

and sacrifice resulting therefrom, would be sufficient to negative any implication that the parties thereto performed reciprocal services in expectation of a reward. Such, however, is not the case. The majority of the courts refuse to apply the presumption on the fact of relationship alone, but demand something more; *i.e.*, a living together. As Keener states: "This rule does not depend, as is so often stated, upon the relationship of parent and child, but upon the household relationship existing between the parties."[34] Thus, the majority of jurisdictions hold that where a child leaves his parent's fireside and establishes himself independently as head of his own family, then services rendered by him to his parent are deemed to have been performed in fulfillment of an implied in law contract.[35] As to what constitutes a breaking off of the household relation, the courts have laid down no definite rules. Inferentially they support the principle that the child must be permanently removed from the dominion of the parent. The importance of this removal of the father's dominion seems to be the keystone of this breaking off of the household relation, rather than other alleged requirements such as the living in a separate house, or the paying of his own rent. This would appear to be borne out by the fact that even where a son has continued to reside in his parent's house, if he acts as the head of his own separate family within that house, then the relationship of which Keener speaks, no longer exists and the services are considered as having been carried out in return for compensation.[36] An actual physical departure from the parent's house would seem, therefore, not to be required.

A minority of cases refuse to apply this household test, placing their decisions squarely upon the parent-child relationship.[37] One of these cases holds that the absence of a living together weakens but does not destroy the presumption that services rendered among members of the same family are pre-

tween parent and child operate as natural factors to promote the cohesiveness of this basic unit and comprise part of nature's plan for the perpetuation of the race. CRONIN, THE SCIENCE OF ETHICS (1917) 388.

34. KEENER, QUASI-CONTRACTS (1893) 319n. To the same effect see WOODWARD, QUASI-CONTRACTS (1913) § 51.

35. Butler v. Kent, 152 Ala. 594, 44 So. 863 (1907); Wilsey v. Franklin, 57 Hun 382, 10 N. Y. Supp. 833 (1890); Marion v. Farnan, 68 Hun 383, 22 N. Y. Supp. 946 (1893); Ellis v. Cox, 176 N. C. 616, 97 S. E. 468 (1918); Steel v. Steel, 12 Pa. St. 64 (1849); Mathias v. Tingley, 39 Utah 561, 118 Pac. 781, 38 L. R. A. (N. S.) 749 (1911). In each of these cases the child was an adult supporting himself on his own efforts.

36. Page v. Page, 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510 (1905). The court justifies its holding on the ground that consanguinity is not the test to be applied but rather the community of interest usually found in a family, concluding that even though the parties lived in the same house there was no community of interest between the mother and son. If the test be recognized as valid, then it must be admitted that the court is coldly logical in its application thereof.

37. Neal v. Neal, 12 Ky. 930, 15 S. W. 1058 (1891); Woods v. Fifth-Third Union Trust Co., 54 Ohio App. 303, 6 N. E. (2d) 987 (1936); Wessinger v. Roberts, 67 S. C. 240, 45 S. E. 169 (1903).. Woods v. Fifth-Third Union Trust Co., *supra*, displays a fine disdain toward the majority view by even failing to consider it in reaching its conclusions which it based upon the moral duty owed to a mother by her son.

sumed to have been gratuitously bestowed.[38] To infer, as the majority rule seemingly does, that the *physical* severance of the child from the family circle, changes the attitude and sentiment of the child in services thereafter rendered is strangely at variance with the experience of humanity. Indeed, the necessities of the parent and the corresponding urge of the child to aid the parent may be accentuated by the withdrawal of the child from the parent's home. To apply a "tape-measure" test to so delicate and sentimental a relationship is hardly consistent with factual experience in this situation. It is submitted, therefore, that the sounder view is that which recognizes that parents and children customarily render services without expectation of payment regardless of whether or not they are living together as a family.

In some of those courts which require a living together, however, the relationship of parent and child seems to carry with it the inference that they are living together, because it is usual for parents and children to reside in the same household.[39] It therefore devolves on the party seeking to recover for services to show that in fact no household relationship does exist.[40]

Adopted children attain the same rights and position within the home as natural children and the same presumption of gratuity applies.[41] By force of adoptive proceedings the adopting parent stands in the place of the natural parent. A somewhat different situation applies, however, in those cases in which the child is not adopted but an arrangement is made between the child's natural parents and those entrusted with his care. A typical situation is one in which a child is placed in a private home under an agreement to provide for his education, but where no express provision is made for compensation for his labors by the family into which he has been taken. In such instance the child is not allowed to recover, the relationship between the parties being such that a family relationship is inferred.[42] New York, however, has indicated a

38. Wessinger v. Roberts, 67 S. C. 240, 45 S. E. 169 (1903).

39. This is to be gathered from the statements in the various cases that where there is a lesser degree of relationship than that of parent and child there must be a positive showing of the household relationship. Moore v. Renick, 95 Mo. App. 202, 68 S. W. 936 (1902); Disbrow v. Durand, 54 N. J. L. 343, 24 Atl. 545 (1892). It is further borne out by the fact that although Pennsylvania is one of those states which considers the living together essential between parent and child, Steel v. Steel, 12 Pa. St. 64 (1849), it still states that the relationship alone is sufficient to overcome the presumption that services are to be reimbursed. *In re* Gibb's Estate, 266 Pa. 485, 110 Atl. 236 (1920). The inference therefore is that the parent-child relation carries with it the implication of a household relationship.

40. See note 35, *supra*.

41. N. Y. DOM. REL. LAW (1916) § 112: "They must present . . . an agreement on the part of the foster parents or parent to adopt and treat the minor as his, or her or their own lawful child. . . ." §§ 110 to 115 of the Domestic Relations Law give the full requirements of adoptive proceedings.

In view of the fact that adoption gives the adopted child the legal status of a natural child in its new home, it is logical to find that the status of adoption carries the same presumption of gratuity of services which obtains between natural parent and child. Hogg v. Laster, 56 Ark. 382, 19 S. W. 975 (1892); Wyley v. Bull, 41 Kan. 206, 20 Pac. 855 (1889); Walker v. Tyler, 28 Colo. 233, 64 Pac. 192 (1901).

42. Rosky v. Schmitz, 110 Wash. 547, 188 Pac. 493, 10 A. L. R. 139 (1920).

tendency to view such a situation in another light; for where a natural father left his child with the plaintiff under an agreement whereby the plaintiff was to keep the child until it had attained full age, the court held that no family relationship existed between the plaintiff and the child, and consequently no presumption of gratuity applied.[43] The court apparently interpreted the mutual agreement as merely establishing the status of a boarder. A child has also been held not to be a member of a family, where, although she lived and ate with a family not related to her, she was not allowed to attend school, had received no education, had done continuous work as a servant, and after arriving at a certain age, had been obliged to supply her own clothing.[44]

The opinions of the courts abound in statements that as the degree of blood relationship decreases the presumption of gratuity grows weaker and is more easily rebuttable.[45] Such a presumption applies between brother and sister, once a living together in the family relation is shown to exist, although the relationship of brother and sister is not of itself sufficient to carry with it the implication that a living together in the same household exists, as in the case of parent and child.[46]

More remote degrees of blood relationship, always assuming that the relatives are residing in the same household, have been sufficient to raise a presumption that services performed in the domestic circle are not inspired by expectation of monetary payment. So it has been held that such implication of gratuity attaches to benefits passing between aunt and uncle,[47] between cousins,[48] and even between brother-in-law and sister-in-law.[49]

As to an adult person living in the family relationship, although not related by blood, marriage or adoption, no decisions have been discovered discussing whether or not the presumption of gratuity would apply.[50] Keener's statement that the source of the presumption is the household and not the blood relationship, if taken in its literal aspect, so as to include strangers to the blood, has only the support of *dicta* from the decided cases.[51] Indeed there are cases which indicate a reluctance to follow such a view.[52]

43. Gordon v. Wyness, 169 App. Div. 659, 155 N. Y. Supp. 162 (2d Dep't 1915). The court in this case construed the facts to raise an implied in fact contract.

44. Doremus v. Lott, 49 Hun 284, 1 N. Y. Supp. 793 (1888).

45. Hill v. Hill, 121 Ind. 255, 23 N. E. 87 (1889); Shane v. Smith, 37 Kan. 55, 14 Pac. 477 (1887); Thornton v. Grange, 66 Barb. 507 (N. Y. 1873); Gorrell v. Taylor, 107 Tenn. 568, 64 S. W. 888 (1901).

46. Disbrow v. Durand, 54 N. J. L. 343, 24 Atl. 545 (1892). See note 39, *supra*.

47. Riley v. Riley, 38 W. Va. 283, 18 S. E. 569 (1893).

48. Reeves' Estate v. Moore, 4 Ind. App. 492, 31 N. E. 44 (1892). But see to the contrary, Gallagher v. Vought, 8 Hun 87 (N. Y. 1876).

49. Carpenter v. Weller, 15 Hun 134 (N. Y. 1878).

50. The reference to an adult person does not include those adults who were adopted into the family as children and who continued to live in the family relationship after attaining maturity. See note 41, *supra*.

51. The principal case relied upon by Keener to support his statement is Disbrow v. Durand, 54 N. J. L. 343, 24 Atl. 545 (1892). KEENER, QUASI-CONTRACTS (1893) 319n. But in that case the blood relationship of sister and brother was present. Likewise are *dicta*, statements from other cases cited in Disbrow v. Durand, *supra*.

52. This trend is indicated by such cases as allowed recovery against a father-in-law,

B. *Husband and Wife*

Arising out of the common law concept of the unity of husband and wife,[53] with its denial to the wife of the right to hold property in her own name,[54] and her inability to contract with her husband[55] flow certain ramifications applicable to the present question. A wife was never able to contract with her spouse for compensation for domestic services performed by her in the scope and fulfillment of the husband-wife relationship. The same rule applied to those services performed by the wife, which, while not strictly domestic (such as helping her husband in his work in the field), were nonetheless not entirely of the commercial nature.[56] Passing on to those services which were clearly of a non-domestic quality we find that the common law disability still prevented an express contract between the husband and wife because of the husband's right to her services.[57] Even the so-called enabling acts have not provided a clear cut departure from the common law rule. While it is true that the majority of the jurisdictions which have passed such legislation have interpreted it to allow the contracting between husband and wife for business services,[58] nevertheless the minority view refuses to concede that the common law right of the husband to his wife's services has been nullified by these acts.[59] Where, however, the husband chances to be a member of a

Johnson v. Tait, 97 Misc. 48, 160 N. Y. Supp. 1000 (Sup. Ct. 1916); a step-mother-in-law, Hardiman v. Crick, 131 Ky. 358, 115 S. W. 236 (1909). These cases were decided on the ground that the relationship was too remote to give rise to the presumption.

53. Thompson v. Thompson, 218 U. S. 611 (1910); White v. Wager, 25 N. Y. 328 (1862); SCHOULER, LAW OF DOMESTIC RELATIONS (Blakemore's ed. 1921) § 4.

54. The husband had a right to the possession and control of the wife's real property. Turner v. Heinberg, 30 Ind. App. 615, 65 N. E. 294 (1902); Sharp v. Baker, 51 Ind. App. 547 (1911); *In re* Riva, 83 N. J. Eq. 200, 90 Atl. 669 (1914). He had a right to the control of her personalty when he reduced it to possession. White v. Clasby, 101 Mo. 162, 14 S. W. 180 (1890); George v. Cutting, 46 N. H. 130, 88 Am. Dec. 195 (1865); Knapp v. Smith, 27 N. Y. 277 (1863).

55. National Granite Bank v. Tyndale, 176 Mass. 547, 57 N. E. 10 (1900); Lossee v. Ellis, 13 Hun 635 (N. Y. 1878).

56. Whitaker v. Whitaker, 52 N. Y. 368 (1873).

57. This because of the husband's right to her services, whether domestic or otherwise. McClintic v. McClintic, 111 Iowa 615, 82 N. W. 1017 (1900); Cregin v. Brooklyn Crosstown R. R., 75 N. Y. 192 (1878); Standen v. Pennsylvania R. R., 214 Pa. 189, 63 Atl. 467 (1906).

58. Moore v. Crandall, 205 Fed. 689 (C. C. A. 9th, 1913) (clerk in store); *In re* Davidson, 233 Fed. 462 (N. D. Ala. 1916) (saleslady); Tuttle v. Shutts, 43 Colo. 534, 96 Pac. 260 (1908) (cook); Roche v. Union Trust Co., 52 N. E. 612 (Ind. App. 1899) (clerk in store); *In re* Cormick, 100 Neb. 669, 160 N. W. 989 (1916) (office assistant); Nuding v. Urich, 169 Pa. 289, 32 Atl. 409 (1895) (cook).

59. *In re* Kaufman, 104 Fed. 768 (E. D. N. Y. 1900); Mott v. Mott, 107 Me. 481, 78 Atl. 900 (1911); Blaechinska v. Howard Mission, 130 N. Y. 497, 29 N. E. 755 (1892). N. Y. DOM. REL. LAW (1909) § 51 would seem to alleviate this disability if construed liberally for it states: "A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect

partnership, or an officer of a corporation and in his official capacity hires his wife to work for the partnership or corporation, there is no doubt that such contract is valid, provided that the husband is not entitled to all the property and earnings of his wife.[60]

It would seem that the majority view is the sounder, in permitting the husband and wife to contract directly for business purposes,[61] especially in view of the relaxation of the common law restrictions upon the wife. New York has recently gone a step further in that direction by permitting married couples to sue each other for personal torts.[62] While it is true that the disability with regard to torts under the common law rule was not put on the same basis as that prohibiting contracts for business services,[63] yet the general trend is away from restriction and in favor of a more equal status between husband and wife. For services outside the home were never required of a wife. The husband could not force her to perform them.[64] It was a matter of choice with the wife as to whether she would or what not perform them. If she did, however, the husband was entitled to the benefit of them. Since she owes him no duty to perform business services, they should be permitted to constitute valid consideration for an express contract.

In the light of this common law background, it should not be difficult to anticipate the rule in quasi-contracts that services rendered by a husband to a wife are so performed in the interest of the marriage relationship and are therefore deemed gratuitous.[65] And this is so even though the services she performs are in the husband's business.[66] Indicative of the difficulty of re-

to her contracts, and be liable on such contracts, as if she were unmarried. . . ." But *In re* Kaufman, *supra*, declares that this does not change the rule in New York, because, it argues, this section only applies to the acquiring of property, not to the creation thereof. And if this statute were interpreted as changing the common law then it would enable the wife to contract with her husband for domestic as well as commercial services. In the absence of an authoritative declaration by the New York Court of Appeals, it must be admitted there is some doubt as to the effect of this section. See note 68, *infra*.

60. Powers v. Fletcher, 84 Ind. 154 (1882) (wife contracted with the firm of which her husband was a partner. He had released all claims to her services); Baker v. Jewel Tea Co., 152 Iowa 72, 131 N. W. 674 (1911) (husband was officer of a corporation and wife was not bound to continue to aid him); Adams v. Curtis, 4 Lans. 164 (N. Y. 1870) (wife allowed to sue members of firm, including husband, for services rendered).

61. There is nothing repugnant to public policy in permitting husband and wife to contract with each other for business purposes outside their marital relationship. The possibility of fraud against third parties is just as inherent in the parent-child relationship, yet that does not prevent them from expressly contracting for rendition of services. See note 139, *infra*.

62. N. Y. DOM. REL. LAW (1909) § 57, as amended by the Laws of 1937, c. 669 § 1.

63. The disability to sue for personal torts was based upon the common law concept of unity. Schultz v. Schultz, 89 N. Y. 644 (1882). The inability to contract for services was based on the common law right of the husband to his wife's services. See note 57, *supra*.

64. Blaechinska v. Howard Mission, 130 N. Y. 497, 29 N. E. 755 (1892).

65. Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892 (1888); Sanders v. Ragan, 172 N. C 612, 90 S. E. 777, L. R. A. 1917B 683 (1916); Monahan v. Monahan, 77 Vt. 133, 59 Atl. 169 (1904).

66. Dorsett v. Dorsett, 188 N. C. 354, 111 S. E. 541 (1922).

moving the presumption of gratuity is the case of *Martin v. Bronx County Trust Company*,[67] wherein the plaintiff, whose husband was a lodging house keeper, cleaned and managed daily two eight-apartment lodging houses, in addition to her domestic duties. Yet the court stated that, granting without conceding that quasi-contractual recovery might be allowed where services were extraordinary,[68] the services in that instance were not so extraordinary as to warrant recovery. It may be assumed that if the services in the *Martin* case were not extraordinary, then no services will ever be so considered, and the court is stating by implication that it will never allow recovery on an implied contract between husband and wife.

While it is true that the fact that husband and wife may not expressly contract for commercial services should not of itself constitute a bar to quasi-contractual recovery,[69] yet the policy motivating the application of the doctrine in regard to express contracts, is apparently carried over to quasi-contracts, and because the husband has in the past possessed the right to her services regardless of their nature, the courts will not thereby consider him unjustly enriched. It is submitted that the same reason for allowing husband and wife to expressly contract for commercial services, suggested *supra, i.e.*, the equalizing of the position of the wife in modern society, should militate for recovery by her when she performs extraordinary services outside the home. Certainly the type of services should be the deciding factor. One case at least, has held that for services rendered to her husband in his business as a bookkeeper, a wife may be entitled to the benefit of the presumption that her services were to be recompensed.[70] This case, at the present stage of the development of the emancipation of woman, would seem, however, to be the exception.

Another problem concerning the marital state arises where services are rendered under an illegal marriage. Where the wife was induced to enter the relation through the fraud of her husband there is a conflict. The majority rule allows her to pursue an action in quasi-contract, on the theory that the husband has been unjustly enriched, and that regardless of her belief, an actual husband and wife relationship does not exist and the presumption of gratuity should not be applied.[71] The minority view on the other hand, closely scrutinizes the actual intent of the wife, holding that regardless of the fact that the marriage was not valid, she nevertheless intended to perform the services gratuitously. Hence, under this view she is permitted to bring an action in tort

67. 237 App. Div. 246, 260 N. Y. Supp. 344 (1st Dep't 1932).

68. Merrell, J. dissenting, pointed out that not one of the cases in New York had been decided prior to the passage of § 51 of the Domestic Relations Law and indicated his belief that the New York courts would follow the example set by their sister states and allow husband and wife to contract for the payment of a reasonable compensation for unusual and extraordinary services outside the household duties.

69. This from the very nature of quasi-contract, which arose apart from contract, in order to prevent unjust enrichment. See note 5, *supra*.

70. *In re* Cox, 199 Fed. 952 (D. D. N. M. 1912).

71. Sanders v. Ragan, 172 N. C. 612, 90 S. E. 777, L. R. A. 1917B 683 (1916); *In re* Fox, 178 Wis. 369, 190 N. W. 90 (1922). The modern trend would seem to favor this view. RESTATEMENT, RESTITUTION (1937) § 40.

for deceit, the services being considered as one of the items of damage.[72] Where both parties are innocent, however, the majority would seem to be the more equitable rule, for it would probably be extended to protect the wife because the husband was unjustly enriched. The minority view, basing its holding on the malice of the husband instead of the theory of unjust enrichment, where the husband is guilty of fraud, finds itself without a justification for allowing recovery to the plaintiff when the husband is not guilty of malice, and thus the plaintiff may not recover for her services.[73]

Where a meretricious relationship exists, however, and services are performed in the furtherance of that relationship, there can be no recovery on an implied in law obligation.[74] The law will refuse to allow any benefit to arise from a cohabitation which violates principles of morality and is inherently opposed to public policy. It must be apparent, however, that these services were clearly rendered in furtherance of the illicit relationship and were not merely incidental thereto. Where, for example, the original cause of the woman's living together in the man's home was to act as his housekeeper or nurse, and she faithfully rendered such services, then the fact that they lived together in concubinage is considered as immaterial in so far as recovery for services rendered is concerned; and the value of the services appearing, the plaintiff may recover as in the ordinary quasi-contractual situation.[75]

A further relationship, not that of husband and wife, but closely analogous, is that between an affianced couple. In view of the approaching marital status, it would be inequitable to consider them as strangers performing services in anticipation of remuneration from the other party. Therefore where services are rendered by a fiancée, provided they are not so rendered in consideration of a promise of marriage,[76] but on account of the motives of love and affection between the parties so situated, the law will presume that they were intended as gratuities.[77] Nor should it make any difference that the fiancée subsequently died.[78]

72. Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892 (1888); Blossom v. Barrett, 37 N. Y. 434, 97 Am. Dec. 747 (1868). Where fraud on the part of the husband is present, this is the more strictly logical point of view, for the wrong to the wife is complete when the illegal marriage has been performed. While subsequent circumstances may result in damages, they cannot change the nature of the wrong.

73. Nicely v. Howard, 195 Ky. 327, 242 S. W. 602 (1922). The court did not salve the wounds caused by this failure of equity by hinting that had there been an express contract for the woman's services it would have allowed recovery.

74. Succession of Pereuilhet, 23 La. Ann. 294, 8 Am. Rep. 595 (1871); Rhodes v. Stone, 63 Hun 624, 17 N. Y. Supp. 561 (1892); Emmerson v. Botkin, 26 Okla. 218, 109 Pac. 531 (1910).

75. Succession of Pereuilhet, 23 La. Ann. 294, 8 Am. Rep. 595 (1871). The rationale behind the holding in such instances is that it violates the equitable sense of the courts to decree that the employer, if allowed to prevail, would be exempt from liability for household services which form the major part of this relationship.

76. Clary v. Clary, 93 Me. 220, 44 Atl. 921 (1899). The reason for the exception where services are in consideration of marriage is that necessarily there must have been an express contract present, for which the services were a consideration.

77. La Fontain v. Hayhurst, 89 Me. 388, 36 Atl. 623 (1896).

78. Newhall v. Knowles, 28 R. I. 348, 67 Atl. 365 (1907). Where, however, the fiancé

An interesting situation arises where there is a conflict between presumptions due to the fact that the daughter of the family has been secretly married while continuing to live with her father, who took care of her and incurred expenses in her behalf. Seeking to recover from the husband for the value thereof on the ground of marital duty,[79] the father is faced by the presumption that services rendered by one member of the family to another are deemed gratuitous.[80] It has been held that the conflicting presumptions cancelled each other, and the jury reached the conclusion that the husband, under the circumstances should be made liable.[81]

II. Commercial Relationships

A. Corporate Directors

A corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law."[82] Necessarily, therefore, this fictional entity must operate through human agencies. This accounts for the existence of the board of directors. Because their position is endowed with greater powers than the mere performance of ministerial functions and calls for the exercise of discretion with respect to the carrying on of the corporate activities,[83] their office is enveloped in a highly fiduciary atmosphere, and is therefore subject to abuse.[84] In the field of corporate activities, their personal advantage must be submerged and the single objective of corporate advancement constantly followed. For this reason they are commonly referred to as "trustees," although strictly speaking there is no actual trust situation present.[85]

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subsequently breaches the contract of marriage, a possible analogy might be drawn between the rendition of services and the gift of an engagement ring. The latter has been considered in the nature of a conditional gift, given with the understanding that the party who breaks the contract must return the ring. Jacobs v. Davis, [1917] 2 K. B. 532. Applying this reasoning to the case of pre-marital services, it might be argued that the courts should consider services performed by a fiancée as conditioned upon the fulfillment by the fiancée of his part of the obligation, and that a failure to do so should permit the fiancée to recover for those services.

79. Benjamin v. Dockham, 134 Mass. 418 (1883); Hatch v. Leonard, 165 N. Y. 435 (1901). In such instances the courts work out a "compulsory agency". Keener, however, would put it on other grounds, namely, that the plaintiff had performed the legal obligation of the defendant in the performance of which the public has an interest. Keener, Quasi-Contracts (1893) 346. In this view the Restatement is in accord with him. Restatement, Restitution (1937) § 113.

80. See note 27, *supra*.

81. Fisher v. Drew, 247 Mass. 178, 141 N. E. 875 (1924).

82. Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636 (U. S. 1819).

83. 1 Morawetz, Private Corporations (2d ed. 1886) § 516.

84. Sargent v. Kansas & Midland R. R., 48 Kan. 672, 29 Pac. 1063 (1892); Smith v. Hurd, 12 Met. 371 (Mass. 1847).

85. Carpenter v. Danforth, 52 Barb. 581 (N. Y. 1868). The directors are, however, treated as trustees in that they cannot dispose of the trust property so as to foster and cause their individual interests to flourish at the stockholders' expense. Hoyle v. Plattsburgh & Montreal R. R., 54 N. Y. 314 (1873). Nor may they bind the corporation to a contract made with themselves personally. Metropolitan Elevated Ry. v. Manhattan Ry., 11 Daly

No man is forced to become the director of a corporation and the interest that the directors have in the stock together with other benefits they may derive incidentally are supposed to be sufficient recompense for their services.[86] The law properly hesitates to assume that a director, alive to the betterment of corporate affairs, is expecting to be paid for every activity not squarely and clearly within the scope of his duties as a director. In the absence of an express contract, therefore, there will be no implication that they are to be reimbursed beyond contractual or statutory compensations for any valuable services they may perform within the scope of their official duties.[87] The necessity of the express contract for services within the scope of their normal duties is to prevent an abuse of the fiduciary relationship in which they stand to the stockholders.[88] So in the absence of an express contract for compensation a director, who is elected president of a corporation and performs merely the normal duties of a president, may not recover therefor;[89] nor may one acting as treasurer under the same circumstances recover.[90] Attorney's services in collecting on a promissory note for the corporation rendered by the president, where the by-laws expressly provided against the payment of a salary to the officers, are insufficient to raise an implied in law contract.[91]

Where a director of a corporation is authorized by the board of directors, acting within their powers to engage in some work clearly outside the normal scope of his activities,[92] and the surrounding circumstances negative the belief that it was to be rendered gratuitously, then the law may imply a promise to pay the reasonable value of those services.[93] Necessarily there must have been an intent on the part of the director performing this work to submit a bill therefor. Whether or not the other directors who authorized him to perform the work intended to pay him is apparently unimportant, so long as it should have been reasonably apparent to them than any undertaking of such a task would necessarily convey to the party performing it the impression that he was to be reimbursed for his achievements.[94]

373, 14 Abb. N. C. 103 (N. Y. 1884). Nor may they represent the corporation in any dealings in the outcome of which they have an interest. Munson v. Syracuse G. & C. R. R., 103 N. Y. 58, 8 N. E. 355 (1886).

86. Kilpatrick v. Penrose Ferry Bridge Co., 49 Pa. St. 118, 88 Am. Dec. 497 (1865).

87. Bassett v. Fairchild, 132 Cal. 637, 64 Pac 1082, 52 L. R. A. 611 (1901); Alexander v. Equitable Life Assurance Society, 233 N. Y. 300, 135 N. E. 509 (1922); Wood v. Lost Lake Manufacturing Co., 23 Ore. 20, 23 Pac. 848 (1890).

88. See note 84, *supra.*

89. Lowe v. Ring, 123 Wis. 370, 101 N. W. 698 (1904).

90. Kilpatrick v. Penrose Ferry Bridge Co., 49 Pa. St. 118, 88 Am. Dec. 497 (1865).

91. Henry Wood's Sons Co. v. Schaefer, 173 Mass. 443, 53 N. E. 881 (1899).

92. Recovery was allowed in the following instances because the court found that the services were not within the ordinary nature of the director's work, and were so far removed therefrom as to indicate an intent to recover compensation; services performed by a director, acting as attorney for the corporation, Taussig v. St. Louis & K. Ry., 166 Mo. 28, 65 S. W. 969 (1901); acting as a general manager in charge of a ranch, Corinne Mill Canal and Stock Company v. Toponce, 152 U. S. 405 (1894); acting as general manager, superintendant, and treasurer, Fitzgerald & Mallory Construction Co. v. Fitzgerald, 137 U. S. 98 (1890).

93. Pew v. First National Bank, 130 Mass. 391 (1881). See also note 92, *supra.*

94. See note 93, *supra.*

However, a stockholder of a corporation, not occupying the position of trust of a director, may recover for services rendered to a corporation at request, even though there is no express contract for compensation.[95] Since he stands in no fiduciary relation toward the other stockholders an implied contract will arise for any valuable services performed by him on behalf of the corporation, so long as there is nothing present in the transaction to negative an intent to recover compensation for such services.

B. Partnership

A partnership is a relationship created between persons carrying on a business owned in common, by contract, either express or implied, with the goal of sharing the profits to be gained from the business.[96] There are some strong elements smacking of the fiduciary character in the dealings between partners, engaged as they are in common enterprise.[97] Because of the fact that he directly shares in the profits of the firm and has a personal interest in the result of the firm's business, each partner is presumed to devote his time to the advancement of the partnership affairs.[98] A mere inequality in the amount of services is sometimes disregarded, even in situations where one partner virtually assumes control of the entire business of the firm.[99] Premised upon such foundations of unremitting and unselfish labor in the interest of the partnership, it should not be difficult to foresee that the presumption of gratuity which applies to the directors of a corporation also applies to the members of a partnership. For services performed in his capacity as partner, he may not recover in quasi-contract.[100] He may only prevail on the basis of an express agreement,[101] or under an implied in fact contract arising from the custom of partnership dealings.[102] There are certain instances in which the partner is allowed to recover on an implied in law contract, provided such services are clearly beyond those

95. Hjorth Oil Co. v. Curtis, 25 Wyo. 1, 163 Pac. 362 (1917).

96. GILMORE, PARTNERSHIP (1911) 1. "A partnership is an association or two or more persons to carry on as co-owners a business for profit." N. Y. PARTNERSHIP LAW (1919) § 10.

97. An individual partner may act as agent of the partnership and bind it by his act. PARSONS, PARTNERSHIP (4th ed. 1893) § 5. A partner who is engaged in a business conflicting with his interest in the partnership is liable to his co-partners for a proportionate share of the profits secretly made thereby. Manufacturer's National Bank v. Cox, 2 Hun 572 (1873), *aff'd* 59 N. Y. 659 (1874). A co-partner purchasing another partner's share in a firm is under an obligation to reveal all information in his ken concerning the affairs of the firm which is not known to the co-partner, or the sale is voidable. Joseph v. Mangos, 192 Iowa 729, 185 N. W. 464 (1921).

98. Lindsey v. Stranahan, 129 Pa. St. 635, 18 Atl. 524 (1889).

99. Even where a surviving or liquidating partner performs all the work in winding up the partnership affairs, there will be no implication of compensation for so doing. Brown's Appeal, 89 Pa. St. 139 (1879). *Cf.* note 106, *infra*.

100. Roediger v. Reid, 133 Wash. 608, 234 Pac. 452 (1925).

101. Denver v. Roane, 99 U. S. 355 (1878); Osement v. McElrath, 68 Cal. 466, 9 Pac. 731 (1886).

102. Morris v. Griffin, 83 Iowa 327, 49 N. W. 846 (1891); Rains v. Weiler, 101 Kan. 294, 166 Pac. 235, L. R. A. 1917F 571 (1917).

required of him in his normal partnership activities.[103] The one apparent requirement is that these services be extraordinary.[104] The New York cases disclose a peculiar unwillingness to grant a partner quasi-contractual relief. In *Levy v. Leavitt*[105] a partner, with only a 20% interest in the partnership exerted himself strenuously, even travelling to Europe, in order to sell perishable property of the partnership. Yet the court held that his services were not sufficiently removed from the normal scope of reasonable partnership activities to warrant an implied in law contract, pointing out that up until 1931 there had only been one recovery allowed by a partner in New York for extraordinary services. To hold, as this case apparently does, that men make such tremendous efforts without any expectation of reimbursement, is to seriously limit the right of quasi-contractual recovery. The presence of "extraordinary" neglect, on the other hand, may impel the courts to imply a contract in favor of the other partners upon whose shoulders the burden has fallen.[106]

C. Employer and Employee

Coming now to the common relationship of employer-employee we find missing from its essence the highly fiduciary quality which distinguished the two previous commercial relationships. The employee is but the instrument of the master's will and operates under his master's orders.[107] The average employee is denied that element of discretion in planning and performing his tasks which marks the director of the corporation or the partner.[108] Nonetheless the

103. In the case of Morris v. Griffin, 83 Iowa 327, 49 N. W. 846 (1891), the plaintiff and the defendant had made an agreement whereby defendant was to serve the partnership for one year without compensation. Meantime the plaintiff obtained a position elsewhere and was thus occupied for 11 years, while the defendant ran the entire business. In examining the facts the court concluded that the defendant should be entitled to counterclaim for those services, not solely because he had run the entire business but because it appeared that he had done more than his share of the partnership work and that such services were far in excess of his ordinary work. In Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593 (1885), under a similar set of facts, one of the partners devoted himself to an outside position, leaving the other to manage the partnership affairs; the partner who bore the burden was allowed to recover. It should be noted that neither of these cases stands for the principle that because one partner did more than the other in caring for the business, he was entitled to recover. The lack of equality of work was merely a factor in evidence to determine whether or not the services rendered were such that it must have been apparent to both that they were not rendered gratuitously.

104. Williams v. Pedersen, 47 Wash. 472, 92 Pac. 287, 17 L. R. A. (N. S.) 384 (1907).

105. Levy v. Leavitt, 257 N. Y. 461, 178 N. E. 758 (1931).

106. This would refer to a refusal or failure to perform on the part of one of the partners of some specific duty. Thus, in Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258 (1902), where the partners had divided certain work between them the refusal of the one partner to perform, entitled the other partner to compensation. And in Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206 (1871), the failure of the partner to perform financial services for the partnership resulted in a recovery for the co-partner. See also ROWLEY, MODERN LAW OF PARTNERSHIP (1916) § 356.

107. State v. Levine, 79 Conn. 714, 66 Atl. 529 (1907)

108. See notes 83 and 97, *supra.*

same presumption of gratuity applies.[109] The salary of a servant is presumed to cover anything which he normally does in his day's work. As each case depends upon its facts the decisions are in a somewhat unsettled state. Generally the claims made by salaried employees may be divided into three categories: (1) cases wherein the servant performs work of a different nature from that for which he contracted, (2) cases wherein the servant works in excess of the customary number of hours, and (3) cases wherein the overtime work is of a dissimilar nature from the employee's ordinary labor. In the first type of work the test applied in quasi-contract is the similarity or dissimilarity of the work performed to the tasks which the servant was originally employed to perform.[110] He must show that the services requested were of such a character and performed under such circumstances as to lead to no other belief on his part than that he was to be permitted to recover extra compensation therefor, and on the employer's part that such services should reasonably create in the latter's mind the expectation of payment.[111] This is also true of the third classification.[112] As to the second type of work (overtime labor of the same nature as the employee's ordinary work) in the absence of an express contract, an employee may not recover in quasi-contract, since the courts feel that there is nothing in overtime of itself to indicate an intent to recover therefor.[113]

Some courts consider more than the mere nature of the work in deciding whether an employee should recover. They make as the test the circumstances and transactions surrounding the parties and attempt to work out from their actions whether or not there was an intent to charge for the services.[114]

The difficulty in determining what constitutes work outside the scope of the employee's ordinary labor is revealed by the conflicting results in some of the cases. On one hand an employee active as a stenographer and bookkeeper was allowed to recover for extra services rendered in collecting accounts;[115] on the other hand, in *Robinson v. Munn*,[116] a housekeeper was prevented from re-

109. Pittsburgh C. C. & St. Louis Ry. v. Marable, 189 Ind. 278, 126 N. E. 849 (1920); Cooper v. Brooklyn Trust Co., 109 App. Div. 211, 96 N. Y. Supp. 56 (2d Dep't 1905).

110. Leahy v. Cheney, 90 Conn. 611, 98 Atl. 132, L. R. A. 1917D 809 (1916); Voorhees v. Combs, 33 N. J. L. 494 (1869); Mathison v. N. Y. C. & H. Ry., 72 App. Div. 254, 76 N. Y. Supp. 89 (3rd Dep't 1902).

111. Middlebrook v. Slocum, 152 Mich. 286, 116 N. W. 422 (1908); Mathieson v. N. Y. C. & H. Ry., 72 App. Div. 254, 76 N. Y. Supp. 89 (3rd Dep't 1902).

112. Carrere v. Dun, 18 Misc. 18, 41 N. Y. Supp. 34 (Sup. Ct. 1896).

113. Gutweiler v. Lundquist, 200 Mo. App. 526, 207 S. W. 838 (1919).

114. Pittsburgh C. C. & St. Louis Ry. v. Marable, 189 Ind. 278, 126 N. E. 849 (1920).

115. Quink v. Sunderline, 23 Idaho 368, 130 Pac. 374 (1913).

116. 238 N. Y. 40, 143 N. E. 784 (1924). The court very clearly expressed the basis for this principle: "The inference of an implied contract to pay the reasonable value of services rendered, which may arise from the mere rendition and acceptance of the service, cannot be drawn, where, because of the relationship of the parties, it is natural that such service should be rendered without expectation of pay. [Citing cases]. Accordingly a salaried employee cannot ordinarily recover, in addition to his salary, the reasonable value of services rendered which fall outside the scope of duties of his employment, unless such services are so distinct from the duties of his employment and of such nature that it would be unreasonable for the employer to assume that they were rendered without expectation of further pay." Robinson v. Munn, 238 N. Y. 40, 43, 143 N. E. 784, 785 (1924).

covering for services rendered as a nurse. It has been said that allowance of recovery for services outside the normal field of employee's activity should be sparingly granted[117] and from a perusal of the cases it is apparent that this bit of advice has been taken to heart by the courts.

Where there are statutes fixing maximum hours of work a day, an employer is not liable to an employee for labor beyond the statutory number of hours,[118] unless it is expressly provided for in the contract of employment, the courts declaring that the passage of such a statute was not intended to confer such a right upon an employee.[119]

The difference between the type of work performed by a director of a corporation and that performed by the ordinary salaried employee is such that the apparent necessity for the presumption of gratuity in his case is less than in the two former instances.[120] Lacking a position of trust, and working for a fixed and moderate salary, the employee should be able to insist that the services which he renders outside of his employment should be paid for. The director or the partner, on the other hand, is interested in the enterprise—parts of it in fact—and may properly be compelled to await compensation out of the larger profits which will follow the successful administration of their executive offices.

III. Societal Relationships

Man's journey through life is lightened by the kindnesses of the friendly heart. For the courts to impress upon such kindly acts, irrespective of surrounding circumstances, the implication that they were motivated by a desire for personal gain would be in many cases to distort the basic intent behind the tender of good deeds.[121] Therefore, when a spontaneous service is performed as an act of kindness and without request, or where the circumstances negative an intention to seek restitution for services rendered, no promise will be implied.[122] Again where friendly services are performed and as an afterthought an attempt is made to charge for them there can be no recovery.[123] And where a friend made daily visits to a sick room,[124] or invited another friend to accompany her on a trip,[125] the courts consider the relations between the parties and the nature of the acts and refused to imply an intent to recover therefor. Nor

117. Mathison v. N. Y. C. & H. Ry., 72 App. Div. 254, 76 N. Y. Supp. 89 (3d Dep't 1902).

118. Schurr v. Savigny, 85 Mich. 144, 48 N. W. 547 (1891); Brooks v. Cotton, 48 N. H. 50, 2 Am. Rep. 172 (1868); Gray v. Hall, 32 Misc. 683, 66 N. Y. Supp. 500 (Sup. Ct., 1900).

119. Luske v. Hotchkiss, 37 Conn. 219, 9 Am. Rep. 314 (1870).

120. Since he is not endowed with the fiduciary character of a director or a partner, he should not be subject to the same checks which are placed upon them.

121. See note 13, *supra*.

122. Joyner v. McMurphy, 26 Ala. 549, 163 So. 533 (1935); Spadoni v. Giaconnazi, 27 Cal. App. 149, 149 Pac. 51 (1915); St. Jude's Church v. Van Denberg, 31 Mich. 287 (1875); Dunbar v. Williams, 10 Johns. 249 (N. Y. 1813).

123. James v. O'Driscoll, 2 Bay 101, 1 Am. Dec. 632 (S. C. 1798).

124. Dallman v. Frank, 1 Cal. App. 541, 82 Pac. 564 (1905).

125. Zane v. De Onativia, 139 Cal. 328, 73 Pac. 856 (1903).

will relief in the form of compensation be allowed to one who has performed the legal obligation of another save in special circumstances.[126] As to whether a charitable institution might recover at a later date from the recipient of charitable services, after the latter has attained a position of economic independence, the courts are divided.[127] But all agree that in the event that a statute or the by-laws of the institution create such liability the institution may prevail and recover for its services.[128]

Closely allied to those cases of friendly services are those styled emergency acts, and connected with the preservation of life and property of another from destruction. Recognizing that in the presence of death all men are more nearly brothers than at any other time, the common law refused to imply an intent to charge for non-professional services performed in the saving of a life.[129] The preservation of property, however, is governed by a more flexible rule, depending upon whether or not the property is saved from impending danger in a sudden emergency. In the event of threatened loss, *Bartholomew v. Jackson*[130] thus states the rule of quasi-contracts, "If a man humanely bestows his labor and even risks his life in voluntary aid to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous and it therefore favors no ground of action." Fire and flood are examples of those sudden emergencies which call the brotherhood of man into action without thought of recompense for their services.[131]

Where, however, one attempts to reclaim his property, which has been not only rescued but kept safe for the true owner, the law allows the person so preserving the property to recover in quasi-contract, not as a reward for the saving but in compensation for the trouble and expense incurred through hold-

126. This is to prevent the foisting of an obligation in quasi-contract upon a party by a volunteer who may often be an intermeddler. Forse v. Haines, 17 N. J. L. 385 (1840); Everts v. Adams, 12 Johns. 352 (N. Y. 1815); RESTATEMENT, RESTITUTION (1937) § 2. Where, however, the legal obligation of another is of such nature, (a) that the public has a grave interest in its prompt performance, (b) that the person on whom the obligation has been imposed has, with knowledge of the facts, either failed to, or apparently will fail to perform, and (c) that the intervenor is the proper person to do so. WOODWARD, QUASI-CONTRACTS (1913) § 193; RESTATEMENT, RESTITUTION (1937) § 115. The most common type of case under this classification is that where a school district has failed in its statutory duty to provide transportation for all children beyond a certain distance from the schoolhouse. Eastgate v. Osago School Dist., 41 N. D. 518, 171 N. W. 96 (1919); Sommers v. Putnam, 113 Ohio St. 177, 148 N. E. 682 (1925).

127. Denying the right to recovery, Montgomery County v. Ristine, 124 Ind. 242, 24 N. E. 990 (1890), on the ground that the law refers his reception to charity. Permitting recovery, Goodale v. Lawrence, 88 N. Y. 513 (1882), on the ground of the performance of the legal obligation of another where there is a matter of grave public concern. Accord: Hanover v. Turner, 14 Mass. 227 (1817).

128. Arlington v. Lyons, 131 Mass. 328 (1881).

129. WOODWARD, QUASI-CONTRACTS (1913) § 201 (1).

130. 20 Johns. 28, 11 Am. Dec. 237 (N. Y. 1822).

131. New Orleans, Ft. J. & G. I. R. R. v. Turcan, 46 La. Ann. 155, 15 So. 187 (1894); Bartholomew v. Jackson, 20 Johns. 28, 11 Am. Dec. 237 (N. Y. 1822); Glenn v. Savage, 14 Ore. 567, 13 Pac. 442 (1887).

ing it for the true owner.[132] The distinction between these two forms of service for the benefit of another's property is one which appeals to the instincts.

Procedural Problems

The courts generally regard the relationships considered above as giving rise to a presumption of free service between the parties.[133] Yet logically it might be argued that if there is an original presumption that valuable services are performed under an expectation of reimbursement, then the revelation of the presence of the fiduciary relationship should merely rebut the original presumption and not of itself raise an independent presumption. Although such a distinction has been labelled academic,[134] yet it has been suggested that a fact situation might arise where a plaintiff might make out a *prima facie* case if no presumption of gratuity existed, and under the same facts be non-suited, if the presumption did exist.[135] It must be recognized, however, that from whatever principle the rationale behind it springs, the courts still generally spell out a presumption of gratuity.[136]

The presumption once having arisen, the important problem from the standpoint of the party seeking recovery is the sufficiency of proof necessary to rebut the implication of gratuity. With the exception of those jurisdictions which prevent the contracting between husband and wife,[137] there is nothing inherent in any of the three major types of relationship which prevents the contracting between parties in respect to business, services and improvements.[138] Therefor, proof of an express contract, it goes without saying, will be sufficient to rebut the presumption.[139] Indeed, there are some decisions which will only allow the presumption to be rebutted by such evidence.[140] They seem to overlook the fact that in the family relationship at least, the parties are not dealing at arm's

132. Chase v. Corcoran, 106 Mass. 286 (1871); Amory v. Flynn, 10 Johns. 102 (N. Y. 1813); Sheldon v. Sherman, 42 N. Y. 484 (1870); Great Northern Ry. v. Swaffield, L. R. 9 Ex. 132 (1874). *Contra:* Watts v. Ward, 1 Ore. 86, 62 Am. Dec. 299 (1854). The preserver of goods in such instance has no lien on them for services and cannot force the owner to take them back. The owner may abandon the property without incurring any liability toward the preserver. "The right to restitution is limited to the reasonable value of services or things necessary to be supplied in order to preserve the subject matter. Repairs beyond those essential for such preservation are made officiously and for these there is no right to restitution." Restatement, Restitution (1937) § 117, comment *c*.

133. Hogg v. Laster, 56 Ark. 382, 19 S. W. 975 (1892); Hardiman's Adm'r v. Crick, 131 Ky. 358, 115 S. W. 236 (1909); Riley v. Riley, 38 W. Va. 283, 18 S. E. 569 (1893).

134. Guild v. Guild, 15 Pick. 129 (Mass. 1833).

135. (1926) 26 Col. L. Rev. 1035.

136. See note 133, *supra*.

137. See note 59, *supra*.

138. The commercial relationship is itself a creature of contract, and there were never any common law disabilities attached to members of a family, except for husband and wife.

139. Price v. Jones, 105 Ind. 543, 5 N. E. 683 (1885); Harris v. Orr, 46 W. Va. 261, 33 S. E. 257 (1899).

140. Hinkle v. Sage, 67 Ohio St. 256, 65 N. E. 999 (1902); Zimmerman v. Zimmerman, 129 Pa. St. 922, 18 Atl. 129 (1889).

length and according to the forms of commerce, and that an implied in fact contract would be more probably the rule rather than the exception. The majority and sounder view permits the jury—in cases involving the family relationship—to consider all the facts in the cases before it and if those facts warrant such a conclusion, to work out an implied in fact contract on the basis of all the evidence.[141] No hard and fast rule as to the quantum or kind of evidence required to rebut the presumption may be laid down, save that a fair preponderance of the evidence must sustain the plaintiff's contention.[142] Necessarily, in cases of this sort, the facts and equities peculiar to the situation before the court will be the deciding factor.[143]

Certain elements which are considered pertinent in weighing the intent of the beneficiary and donor of services are: the fact that the party performing the services kept no books in which the services were listed against the beneficiary's name, indicative of a lack of intent to charge therefor;[144] the nature of the services, whether or not they are the type which a party would render without expectation of reimbursement;[145] the payment of money to the plaintiff and receipt thereof without objection, as apparent recognition of full payment for his services;[146] the statements of the plaintiff evidencing lack of intent to demand reimbursement.[147]

As to the various kinds of business relationship, little may be said of the type of evidence, which will cause a plaintiff to prevail in the absence of an express contract, since the requirement of "extraordinary" services outside the scope of the original agreement of employment, must be viewed in the light of what constitutes the plaintiff's normal duties. He must sustain the burden of proof and on all the evidence it should be for the jury to say whether or not the facts are such as to warrant the implication by law of a contract.[148]

Conclusion

It might be thought that the foregoing limitations upon quasi-contractual recovery are exceptions to the general rule that where valuable services are rendered to another and he is unjustly enriched thereby, the law will create an implied in law contract to make restitution.[149] But from the very equitable nature of quasi-contractual recovery it becomes apparent that these seeming

141. In cases of this sort it is for the jury to say from all the circumstances, whether or not there was a mutual understanding that the services were to be reimbursed. See note 29, *supra*.

142. Keener, Quasi-Contracts (1893) 318n.

143. See page 421, *supra*.

144. *In re* Goldrick's Will, 198 Wis. 500, 224 N. W. 741 (1929). Plaintiff was an experienced business man, and the courts drew from his failure to keep any accounts for the services which he rendered to his neighbor, the conclusion that he considered that the remuneration received was payment in full.

145. Frailey v. Thompson's Adm'rs, 20 Ky. 1179, 49 S. W. 13 (1899).

146. See note 144, *supra*.

147. Hewitt v. Anderson, 56 Cal. 476, 38 Am. Rep. 65 (1880).

148. Keener, Quasi-Contracts (1893) 318n.

149. See note 6, *supra*.

exceptions exist not as tangents or deviations from the general rule but as a defensible development which in fact preserves the equitable functions of that rule and keeps it within the bounds of conscience. It is true, however, that one is not always impressed by the same necessity for the presumption under all the stated relationships. Reason and humanity dictate that it should be applied in the case of parent and child and others closely bound by the family relationship, or where the societal relationship inspires action for the benefit of parties in distress. But it is less clearly indicated where the commercial relation is the tie uniting the actions of the parties. Even in this setting the powers possessed by the director of a corporation or by the member of a partnership argue for a retention of the presumption against reimbursement. In the case of a mere employee not endowed with the latitude of the fiduciary's calling, it is questionable whether the presumption of gratuity should be retained in its present form.

THE PRACTICE OF THE HEALING ARTS: SOME REGULATORY PROBLEMS.*—Like their brothers the lawyers, the doctors of medicine are considerably concerned over the inroads made in their professional practice.[1] The exponents of healing cults which do not recognize the therapeutic principles and methods of medical science have succeeded in winning the confidence and loosening the purse-strings of a substantial number of persons.[2] Medical men profess scorn for their competitors' techniques[3] and apprehension of the results of their

* It will become apparent to the reader that this paper must of necessity concern itself to some degree with the scientific merits of the various forms of medical healing. It is desirable, of course, that an objective approach be made to this problem, especially by the layman, who is neither desirous nor capable of evaluating the respective claims advanced by either organized or sectarian medicine. It is only fair to state, however, that the writer's conclusions are based upon his personal conviction, derived from reading arguments on both sides, that the medical men present a better case. Nevertheless, an effort has been made to be impartial, and if the reader detects any bias on any controversial subject, he is earnestly requested to disregard it.

1. There is a striking similarity in the predicament in which both professions find themselves. Just as lawyers find their practice being whittled away by banks, trust companies, and title companies, so doctors are confronted with the problems of the osteopaths, chiropractors, naturopaths, and faith healers. It was estimated in 1932 that there were 16,000 chiropractors, 10,000 faith healers, 7,650 osteopaths, and 2,500 naturopaths—almost one-fourth of the total number of practising physicians. REED, THE HEALING CULTS (1932) 1. These figures do not include optometrists, midwives, chiropodists, and pharmacists, in themselves numbering well over 100,000. PEEBLES, MEDICAL FACILITIES IN THE UNITED STATES (1929) 16. Members of these groups, however do not profess to cure all disease, but only to perform certain services, and this paper will not be concerned with their activities.

2. It is estimated that over $125,000,000—about 12% of the annual fee bill of the physicians—is paid to drugless healers. Chiropractors receive $63,000,000; osteopaths, $42,000,000; naturopaths, $10,000,000; and faith healers, $10,000,000. REED, *loc. cit. supra* note 1.

3. *E.g.*, Dr. Morris Fishbein, editor of the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION and HYGEIA, has analyzed the tenets of the healing cults at some length. His conclusions bespeak only the greatest scorn for their theories and dogmas. See especially his FADS AND QUACKERY IN HEALING (1932). Chiropractors counter with statements of repu-